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No. 96-1654

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANK J. MUSCARELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United State Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)(1), which imposes a five-year prison term upon anyone who "carries" a weapon during and in relation to any drug-trafficking crime, is violated when a defendant knowingly possesses a firearm in the locked glove compartment of a truck, but could not readily access the firearm during the commission of the underlying crime.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were Frank J. Muscarello, as Defendant-Appellee, and the United States of America, as Appellant.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 106 F.3d 636, and is reprinted at pages 1a-7a of the appendix to the petition for certiorari. The opinion of the United States District Court for the Eastern District of Louisiana, granting petitioner's motion to quash or dismiss count 3 of the indictment against him, is not officially reported, although it is available at 1996 WL 173374, and is reprinted at pages 8a-11a of the appendix to the petition for certiorari. The district court's opinion denying the government's motion for reconsideration is unreported; it is reprinted at pages 12a-13a of the appendix to the petition for certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 13, 1997. The petition for a writ of certiorari was filed on April 18, 1997. On December 12, 1997, this Court granted the petition in this case and consolidated it with *Cleveland v. United States*, No. 96-8837. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1994).

STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18, United States Code, provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or

firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

STATEMENT

1. On December 8, 1994, petitioner Frank J. Muscarello was arrested by federal agents for violation of federal drug statutes. At the time of his arrest, petitioner acknowledged to the arresting officers that he had a .38 caliber handgun located in the locked glove compartment of his truck. Pet. App. 8a.

2. On May 25, 1995, pursuant to a plea agreement (*see* J.A. 6-10), petitioner pleaded guilty to conspiracy to distribute marijuana and distribution of marijuana. *See* 21 U.S.C. §§ 841(a)(1), 846 (1994). Petitioner also pleaded guilty to count 3 of the indictment against him, which charged him with "using and carrying" a firearm in relation to those crimes, pursuant to 18 U.S.C. § 924(c)(1) (1994). J.A. 3-5; Pet. App. 2a, 9a, 12a. In pertinent part, the factual basis for petitioner's guilty plea, which was prepared by the government and signed by petitioner's lawyer, was the following:

> Located inside the glove compartment of the defendant Muscarello's Ford truck was a loaded firearm which the defendant knowing possessed in his vehicle and carried for protection in relation the above described drug trafficking offense. [*sic*]

J.A. 12; Pet. App. 2a, 9a, 12a. It was no surprise that petitioner had a gun in his locked glove compartment at the time of his arrest: Since 1954, petitioner had held a variety of law-enforcement positions, including constable, chief of police, and — at the time of his arrest

— a bailiff in the 21st Judicial District Courthouse, employed by the Tangipahoa Parish Sheriff's office. Pet. App. 3a, 10a. According to the pre-sentence report, the gun had "been [in the glove compartment] for a long period of time" before petitioner's arrest. Pet. App. 13a.

3. After his guilty plea, but prior to sentencing, this Court, on December 6, 1995, decided *Bailey v. United States*, 516 U.S. 137 (1995). In *Bailey*, this Court held that the term "uses . . . a firearm" in section 924(c)(1) must be given its ordinary and natural meaning, as understood in the context of that statute — not "possession alone" or "mere possession" but "active employment of the firearm." *Id.* at 144.

4. In view of *Bailey*, petitioner, on March 8, 1996, filed a motion to quash or dismiss count 3 of the indictment, pursuant to FED. R. CRIM. P. 12(b)(2). The government conceded that, after *Bailey*, petitioner's conviction "could no longer rest on the previously valid, alternative basis for his conviction, i.e. that he 'used' the firearm in connection with the drug deal."[1] The government maintained, nonetheless, that petitioner had still "carried" the gun, as he had acknowledged by his guilty plea. Pet. App. 9a.

5. On April 11, 1996, the district court granted petitioner's motion and dismissed count 3 of the indictment against him. Pet. App. 11a. While noting the "not very eloquen[t]" factual basis prepared by the government for petitioner's guilty plea hearing (Pet. App. 9a), the district court relied on additional facts, found in the pre-sentence report prepared by the United States Probation Office, that established that "defendant did not knowingly possess the firearm *in relation* to a drug-trafficking crime," but "in furtherance of his job requirements and not for active employment in the charged transaction." Pet. App. 10a.

6. On April 19, 1996, the government filed a motion for reconsideration in the district court. The government urged that petitioner, by admitting to the government's factual basis for his guilty plea, had "acquiesced in and admitted to" carrying a firearm in

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[1] Gov't C.A. Br. at 8 n.2.

relation to a drug-trafficking offense. Pet. App. 12a. The district court denied this motion on May 7, 1996, noting, *inter alia*, that "[t]his is true, but the Court notes that this is a pre *Bailey* composition by the government and a pre *Bailey* consideration by defendant and his counsel." *Id.* The district court thus concluded that petitioner "did *carry* a firearm in the locked glove compartment of his vehicle, but not *in relation* to the commission of a drug trafficking crime." Pet. App. 13a.

7. On June 7, 1996, the government appealed the district court's determination to the Fifth Circuit. The Fifth Circuit reversed, *per curiam*, on February 13, 1997. In reversing, the court of appeals held that the district court had committed "two errors of law" in reaching its decision to dismiss count 3 of the indictment. Pet. App. 5a.

a. The first error identified by the court of appeals involved the question of whether *Bailey*, which dealt with the "use" prong of section 924(c)(1), had any relevance to a conviction under the "carries a firearm" prong of that statute. Noting the district court's characterization of the factual basis for petitioner's guilty plea as "a 'pre-*Bailey* composition by the government and a pre-*Bailey* consideration by Defendant and his counsel'" (Pet. App. 5a), the court of appeals called the district court's reliance on *Bailey* "a legal non sequitur"; since "*Bailey* did not address the *carrying* facet of § 924(c), our prior jurisprudence on carrying remains applicable." Pet. App. 4a-5a. Following Fifth Circuit cases that were decided prior to *Bailey*, the court of appeals held that petitioner's conviction could be upheld so long as the firearm was "knowingly possessed" anywhere in petitioner's truck: "[T]he 'carrying' requirement of § 924(c) is met if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime." *Id.* (citations and quotations omitted).

b. The second legal error identified by the Fifth Circuit involved not the "carry" aspect of section 924(c)(1), but the "in relation to any . . . drug trafficking crime" aspect of that statute. The district court, relying on the probation office's pre-sentence report, had held that petitioner's possession of the gun was "in furtherance of his job requirements," not "*in relation* to a drug trafficking crime." Pet.

App. 10a. The court of appeals held that the district court should not have relied upon petitioner's "self-serving declaration" in the pre-sentence report "regarding his subjective intent in possessing the pistol in the truck." Pet. App. 5a. According to the court of appeals, the district court erroneously "allowed the PSR to supplant the formal plea agreement." *Id.*

c. In conclusion, the Fifth Circuit noted that *Bailey* "did nothing to invalidate our pre-*Bailey* 'carrying' jurisprudence, at least as to those instances of drug trafficking that involve the use of motor vehicles in which firearms are possessed." Pet. App. 5a-6a. Thus, the court concluded, "the fact that the glove compartment was locked does not prevent conviction." Pet. App. 6a.

SUMMARY OF ARGUMENT

The phrase "carries a firearm," 18 U.S.C. § 924(c)(1), means "to bear the firearm upon the person," or at its broadest, "to be immediately accessible for use as a weapon when in a vehicle." Because petitioner's firearm was neither, his conviction under section 924(c)(1) should be reversed.

I. As ordinarily understood, the phrase "carries a firearm" means "to bear the firearm upon the person." This construction is most consistent with the text, context, and history of section 924(c)(1), and is further supported by the rule of lenity.

Although dictionaries provide a wide choice of definitions for the word "carry," its specific meaning becomes apparent when considered in the context of section 924(c)(1), which uses the term "carries a firearm." The ordinary and natural understanding of the verb "carry," when its direct object is "a firearm," is "to bear on one's person." This construction of section 924(c)(1) is also supported by the previously stated views of members of this Court (*see, e.g.*, *Bailey v. United States*, 516 U.S. 137, 146 (1995); *Smith v. United States*, 508 U.S. 223, 236 (1993); *id* at 245-46 (Scalia, J., joined by Stevens and Souter, JJ., dissenting); *United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting)), and confirmed by ordinary linguistic principles.

Thus, "carry" cannot mean either "possess," as the Fifth Circuit in this case held, or "transport," as the government has previously suggested. As it has in many other firearms statutes, Congress might have chosen different and broader language (like "possess" or "transport") to give a different meaning to section 924(c)(1), but it did not. Instead, Congress reserved the harsh mandatory minimum sentence of section 924(c)(1) for only the most dangerous firearm-related conduct — "active employment" of a weapon ("use") or bearing a weapon on one's person ("carrying") during the commission of a crime. Consistent with this sensible understanding, Congress has typically penalized less-dangerous firearm conduct, such as "possession" or "transportation," with far less Draconian sentences.

Additionally, while the legislative history of section 924(c) is sparse, what does exist supports petitioner's construction. The repeated examples in the legislative history of what constitutes "carrying a firearm" strongly point towards petitioner's proposed construction. Finally, this construction, which is at the very least a reasonable one, is compelled by the rule of lenity.

Under this construction of "carries a firearm," petitioner's conviction must be reversed. The firearm in this case was located in the locked glove compartment of petitioner's truck, and was never borne on petitioner's person during and in relation to the drug crimes for which he was convicted.

ii. Even if this Court should decline to accept petitioner's proposed construction of section 924(c)(1), it should, at a minimum, reject the government's and Fifth Circuit's constructions and hold that a firearm in a vehicle must at least be immediately accessible for use as a weapon in order to be "carried." This construction is supported by decisions of the Second, Sixth, and Ninth Circuits. While this construction is not quite as faithful to the statutory text as the "bears upon one's person" construction, it is still far more consistent with the statutory language than the broad constructions given by the Fifth Circuit in this case, or proposed by the government here. Additionally, this construction would prevent "carrying" from collapsing into mere "possession" or "transportation," and under the rule of lenity, it is still far preferable to the broader constructions.

Petitioner's conviction would also have to be reversed under this intermediate construction of the statute. A firearm located in a locked glove compartment is not, by definition, "immediately accessible."

III. Neither the construction of the statute advocated by the government, nor the one adopted by the Fifth Circuit in this case, can be squared with the text and context of section 924(c)(1), or its history.

As noted above, "carry" cannot mean "transport" (as advocated by the government) or "knowingly possess" in a vehicle (as stated by the Fifth Circuit below): As evidenced by other firearms provisions, Congress might have chosen broader language such as "transports" or "possesses," but it did not. Moreover, the government's and Fifth Circuit's approaches would distort the language of the statute; indeed, the Fifth Circuit admits that under its approach, the statutory language "carries a firearm" takes on a "different meaning" when a vehicle is involved. Such an approach would violate every coherent principle of statutory construction, present courts with impossible line-drawing problems, and cause absurd results. Finally, even if the government's or the Fifth Circuit's constructions could be said to be "reasonable," neither construction is the "unambiguously correct" understanding of the statute. Accordingly, the rule of lenity would compel the adoption of one of the two narrower constructions of the statute proposed by petitioner.

ARGUMENT

Section 924(c)(1) of Title 18, United States Code, imposes a mandatory five-year prison term when the defendant "uses or carries a firearm" "during and in relation to any crime of violence or drug trafficking." In *Bailey v. United States*, 516 U.S. 137 (1995), this Court held that "uses" in section 924(c)(1) requires "active employment" of the firearm. The question presented in this case is: What does it mean to "carr[y] a firearm"?

Petitioner submits that the natural understanding of the term "carries a firearm" is "bears a firearm on one's person." At its broadest, "carries a firearm" might admit of a definition requiring the firearm to be not necessarily on the defendant's person, but at least

immediately accessible to the defendant, so that it is ready for "use." In any event, neither the government's proffered definition ("transports") nor the construction adopted by the Fifth Circuit below ("knowingly possesses" in a motor vehicle) can be squared with ordinary principles of statutory construction. And in all events, since the narrower constructions of section 924(c)(1) are at least as reasonable as the government's and Fifth Circuit's constructions, the rule of lenity would require the narrower ones to prevail. Petitioner's conviction should be reversed.

I. A PERSON "CARRIES A FIREARM" BY BEARING IT UPON HIS PERSON

The term "carries a firearm," as it is ordinarily understood, means "to bear the firearm upon the person." This interpretation of section 924(c)(1) is supported by the statute's text and context, its legislative history, and ultimately, by the rule of lenity.

1. As this Court has so often explained, "[t]he task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). *See also, e.g., Bailey v. United States*, 516 U.S. at 144-45; *Smith v. United States*, 508 U.S. 223, 228 (1993); *Pennsylvania Public Welfare Dep't v. Davenport*, 495 U.S. 552, 557-58 (1990). "[I]n this case, it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 241, quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

Section 924(c)(1) imposes an enhanced sentence on anyone who, "during and in relation to any . . . drug trafficking crime . . . carries a firearm." 18 U.S.C. § 924(c)(1). Because the statute contains no special or technical definition of the term "carries a firearm," it must be construed in accordance with "its 'ordinary or natural' meaning." *Bailey v. United States*, 516 U.S. at 145, quoting *Smith v. United States*, 508 U.S. at 228. *See also, e.g., Chapman v. United States*, 500 U.S. 453, 462 (1991); *Perrin v. United States*, 444 U.S. 37, 42 (1979).

In order to determine the "ordinary or natural meaning" of the term "carries a firearm," it is appropriate to start with the dictionary definition of "carry." *See, e.g., Bailey v. United States*, 516 U.S. at 145; *Smith v. United States*, 508 U.S. at 228-29. But here, the dictionary by itself cannot completely answer the question. For example, the principal dictionary cited by the government in opposing certiorari (Opp. 6, 10) lists 37 separate definitions for "carry" — 29 when it is used as a transitive verb (*i.e.*, a verb requiring an object), and eight more when it is used as an intransitive verb. *Webster's Third New International Dictionary* 343 (1976). Similarly, the dictionary employed by this Court in *Bailey v. United States*, 516 U.S. at 145, offers 32 different definitions for "carry." *See Webster's New International Dictionary of the English Language* 412 (2d ed. 1950). Another leading dictionary contains 31 different definitions of "carry." *See Webster's II New Riverside Dictionary* 233 (1984). And the *Oxford English Dictionary* lists 56 separate entries for the word "carry." II *The Oxford English Dictionary* 919-22 (2d ed. 1989). In view of the wide variety of dictionary definitions of the word "carry," it is obvious that the dictionary by itself cannot answer the question of what it means to "carr[y] a firearm."

To answer this question based on the plain language of the statute, then, it is also necessary to consider the *context* in which the word appears. Courts must "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. '[T]he meaning of statutory language, plain or not, depends on context.'" *Bailey v. United States*, 516 U.S. at 145, quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (additional internal quotation omitted). The meaning of individual words such as "carries" in section 924(c)(1) thus cannot be "viewed in isolation," but rather must be interpreted "in light of the terms that surround it." *Smith v. United States*, 508 U.S. at 229. *See also King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991).

The context of section 924(c)(1) makes clear that the appropriate definition of "carries" is "bears on one's person." According to one *Webster's* dictionary, when the object "carried" is a firearm, the natural understanding of "carry" is "[t]o have or keep on one's person (*carry* a gun)." *Webster's II New Riverside University Dictionary*

at 232-33. So, too, other widely used dictionaries utilize this same contextual understanding of "carry." *Black's Law Dictionary* defines the *phrase* to "carry arms or weapons" as "[t]o wear, bear, or carry them *upon the person or in the clothing or in a pocket*, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." *Black's Law Dictionary* 194 (5th ed. 1979) (emphasis added).[2] The dictionary relied upon by the government in opposing certiorari likewise defines "carry arms" as "[t]o bear weapons." *Webster's New International Dictionary of the English Language* at 412. And the *Oxford English Dictionary* notes that, when the object of the transitive verb "carry" is a weapon, as in "to carry arms," "carry" means "[t]o bear, wear, hold up, or sustain, as one moves about; habitually to bear about with one (*e.g.* any ornament, ensign, personal adjunct; also a name or other distinction)." II *The Oxford English Dictionary* at 921. The context of section 924(c)(1) thus establishes that a firearm must be borne on the defendant in order to be "carried."[3]

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[2] Even when *Black's* defines the word "carry" as a single word in isolation, it still makes clear that, in contexts where the object of the verb "carry" is a weapon, "carry" means "[t]o have or bear upon or about one's person, as a watch or weapon." *Black's Law Dictionary* at 194. *Accord Webster's Third New International Dictionary* at 343 ("to hold, wear, or have upon one's person (he *carries* a watch)").

[3] In an episode of the television series "M*A*S*H," the noted punster (and equally noted pacifist) Dr. "Hawkeye" Pierce illustrated that "carry" has a wide variety of definitions, which depend heavily on the context in which the word is used. When Captain Pierce's superior and nemesis, Major Frank Burns, ordered him to carry a sidearm in a holster, Captain Pierce responded:

> "I will not carry a gun, Frank. When I got thrown into this war I had a clear understanding with the Pentagon: no guns. I'll carry your books, I'll carry a torch, I'll carry a tune, I'll carry on, carry over, carry forward, Cary Grant, cash and carry, carry me back to Old Virginia, I'll even 'hari-kari' if you show me how, but I will not carry a gun!"

See <www.geocities.com/Hollywood/8915/mashquotes.html>; *hear also* this monologue at <www.elpaso.net/~jwprice2/carry.wav> (both visited on Jan. 21, 1998). Captain Pierce was, of course, refusing to bear a gun on his person.

This Court, in both *Bailey v. United States* and *Smith v. United States*, understood "carries a firearm" in a fashion consistent with the interpretation proposed by petitioner. The Court's unanimous opinion in *Bailey* offered the following examples of what constitutes "using" a gun without "carrying" it, and vice-versa:

> Under the interpretation we enunciate today, a firearm can be used without being carried, e.g., when an offender has a gun on display during a transaction, or barters with a firearm *without handling it*; and a firearm can be carried without being used, e.g., *when an offender keeps a gun hidden in his clothing throughout a drug transaction*.

Bailey v. United States, 516 U.S. at 146 (emphasis added). At least for purposes of this example, the Court was plainly seizing upon the ordinary and natural meaning of "carrying a firearm" — "handling" it. At the very least, this use of the term is entirely consistent with petitioner's proposed construction. Likewise, this Court's explicit example of what *would* constitute "carrying" — keeping a gun "hidden in [one's] clothing" — is also consistent with petitioner's construction: "borne on the person."

Similarly, both the majority and dissenting opinions in *Smith v. United States* ascribed a similar understanding to "carries a firearm." The majority stated the view that a defendant "would . . . 'carry' the firearm *by keeping it on his person* whether he intends to exchange it for cocaine or fire it in self-defense." 508 U.S. at 236 (emphasis added). So, too, in dissent, Justices Stevens and Souter joined Justice Scalia's proposal that, "in the context 'uses or carries a firearm,'" the word "carries" "means carrying it in such manner as to be ready for use as a weapon." 508 U.S. at 245-46 (Scalia, J., dissenting). This understanding, too, comports with the "bears on the person" definition. Similarly consistent with petitioner's construction is then-Chief Judge Breyer's view of the proper definition of carry: "the ordinary meanings of the words 'use' and '*carry*' . . . connote activity

beyond simple possession." *United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting) (emphasis added).

Principles of linguistics, too, support this understanding. To say "W carries a gun," unmodified further by an informational phrase, is to say that W bears a gun on his person. The *en banc* Ninth Circuit recognized this "default understanding" of the phrase "carries a firearm" in its recent decision in *United States v. Foster*, No. 89-10405, 1998 WL 2521 (9th Cir. Jan. 5, 1998) (*en banc*). Judge Kozinski, writing for an 8-3 majority of the *en banc* court, explained this natural understanding:

> If I were to say "Don Corleone is carrying a gun" — or even just "Don Corleone is carrying" — you would understand that the Don has a sidearm *somewhere on his person*. A synonym for carry in this sense is to "pack heat." Criminals who pack heat are obviously much more dangerous than those who do not.

Id. at *1 (emphasis added). The unmodified, default interpretation of "carries a firearm," which is "has a sidearm somewhere on his person," is clearly the correct way to understand that term as it is used in section 924(c)(1).

Congress would have had to have used additional words, or different words, to ascribe a different meaning to the statute. For example, Congress might have sought to convey a different, broader understanding of "carries a firearm" by adding an informational phrase, such as a prepositional phrase — *e.g.*, "W carries a firearm *in his car*." Indeed, this Court recognized this linguistic principle in *Bailey*, when it noted that one might say "I *use* a gun to protect my house, but I've never had to *use* it." 516 U.S. at 143. This Court held that the latter, unmodified understanding of "use [a gun]" ("active employment") comported best with section 924(c)(1), which similarly contains the term "uses . . . a firearm" without further modification. But to convey an understanding of the term "use a gun" different than this default interpretation, the Court had to add the informational phrase "to protect my house." This signalled the reader to a different and broader understanding of "use" (*i.e.*, "possess for purpose of protection," rather than "actively employ"). Since "uses . . . a firearm" appears in section 924(c)(1) *without* such

an informational phrase, this Court held that the proper understanding of the term was the default interpretation — "active employment." *See Bailey v. United States*, 516 U.S. at 149.

Alternatively, Congress might have sought to convey a different meaning in section 924(c)(1) by choosing a different verb. Instead of using the verb "carries" with the object "firearm," Congress might have chosen a different verb, such as "possesses" or "transports." But Congress did not choose to use either of those words to describe the conduct criminalized by section 924(c)(1).

This was a significant choice on Congress's part. Congress has often used the terms "possess" and "transport" to criminalize other gun-related conduct; if it had meant either "possess" or "transport" in section 924(c)(1), it easily could have said that. "Carry" cannot mean "possess" for the same reason that, as this Court explained in *Bailey*, "use" cannot mean "possess": "Had Congress intended possession alone to trigger liability under § 924(c)(1) it easily could have so provided. This obvious conclusion is supported by the frequent use of the term 'possess' in the gun-crime statutes to describe gun-related conduct. See, *e.g.*, §§ 922(g), 922(j), 922(k), 922(*o*)(1), 930(a), 930(b)." *Bailey v. United States*, 516 U.S. at 143. *See also United States v. Foster*, 1998 WL 2521, at *3 ("The broad definition [advocated by the government] encompasses something close to the mere possession the Supreme Court in *Bailey* said was not within the scope of section 924(c)(1)."); *United States v. McFadden*, 13 F.3d at 467 (Breyer, C.J., dissenting) ("the ordinary meanings of the words 'use' and 'carry' . . . connote activity beyond simple possession").[4]

So, too, "carry" cannot mean "transport." Congress has used variations of "transport" many times in the firearms statutes,

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[4] Indeed, on several occasions since 1989, members of Congress have attempted, without success, to amend the text of section 924(c) in order to criminalize "possession" as well as the using and carrying of a firearm. *See* Cunningham & Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm,"* 73 Wash. U.L.Q. 1159, 1198-1203 (1995); *see also* n. 5, *infra*.

including in section 924 itself. *See, e.g.*, 18 U.S.C. §§ 922(a)(1)(A), 922(a)(1)(B), 922(a)(2), 922(a)(3), 922(a)(4), 922(a)(5), 922(e), 922(f)(1), 922(g), 922(h), 922(i), 922(j), 922(k), 922(n), 924(b), 925(a)(1), 925(a)(2), 925(a)(4) (1994). "If Congress meant 'transport' in section 924(c), it knew how to say so." *United States v. Foster*, 1998 WL 2521, at *3. *See also United States v. Cardenas*, 864 F.2d 1528, 1534-35 (10th Cir.) ("Congress knows how to use 'transports' when it chooses; in § 924(c) it did not so choose"), *cert. denied*, 491 U.S. 909 (1989); *United States v. Bailey*, 36 F.3d 106, 125 (D.C. Cir. 1994) (*en banc*) (Williams, J., dissenting) (same), *rev'd*, 516 U.S. 137 (1995); Note, *Excuse Me, Are You "Using" That Gun? The United States Supreme Court Examines 18 U.S.C. § 924(c)(1) in* Bailey v. United States, 30 Creighton L. Rev. 513, 563 (1997) ("Congress did not intend to impose a section 924(c) violation upon an individual . . . who merely 'transported' a firearm while committing a drug trafficking crime."); *see generally Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotation omitted). If Congress wishes to criminalize either possession or transportation of a firearm, or both, during and in relation to a drug-trafficking crime, it is free to do so in the future. But, to date, it has not done so.[5]

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[5] Congress is presently considering legislation that would amend section 924(c)(1) in light of this Court's *Bailey* decision. The Senate has passed a bill amending the relevant language of section 924(c)(1) so that it would read: "[Whoever], during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, *or who, in furtherance of any such crime, possesses a firearm*, . . . shall . . . be sentenced to imprisonment . . . ." S. 191, at 2-3, 105th Cong., 1st Sess. (passed Nov. 13, 1997).

Likewise, presently pending before the House of Representatives is a bill, H.R. 424, 105th Cong., 1st Sess. (1997), that was adopted by the House Committee on the Judiciary on September 9, 1997. H.R. 424 would abolish the present "uses or carries" structure of section 924(c)(1) in favor of a "graded penalty structure" that would impose a 10-year prison sentence for "possess[ing] a firearm in furtherance of the crime," a 15-year sentence for "brandish[ing] a firearm" during and in relation to the crime, and a 20-year sentence for "discharg[ing] a firearm" during and in relation to the crime. *See* H.R. Rep. No. 105-344, at 2, 3 (1997). The House Judiciary Committee also noted that "[t]he word 'possession' has a broader meaning than either 'uses' or 'carries.'" *Id.* at 6.

Construing "carries a firearm" to mean "bears on one's person" is also consistent with Congress's decision to criminalize together, in section 924(c)(1), both the "use" and the "carrying" of a firearm. Two Terms ago, this Court in *Bailey* established that "use" of a firearm under section 924(c)(1) requires a narrow definition — "active employment" of the weapon — not a broad definition, such as merely placing the gun "at the ready," as the government had argued. 516 U.S. at 150. Thus, in order to preserve the parallel structure of the statute, the term "carries" in section 924(c)(1) should also be construed narrowly, limited to its ordinary and natural meaning of "bears on the person." "Construing the two terms *in pari materia*, [there is] no basis for defining 'carry' broadly while 'use' is defined narrowly." *United States v. Foster*, 1998 WL 2521, at *3.

Petitioner's proposed construction of section 924(c)(1) also makes perfect sense when its severe mandatory minimum sentences are compared to the lesser, more flexible sentences generally permitted under other firearms statutes. *See generally* Cunningham & Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm,"* 73 Wash. U.L.Q. 1159, 1188 (1995). Section 924(c)(1) imposes a grave, mandatory minimum sentence of five years for "carrying" a firearm during and in relation to a crime of drug trafficking, and provides that the minimum sentence will escalate to ten, twenty, or thirty years, or "life imprisonment without release," depending on the type of firearm carried and whether the offense is a second or subsequent offense. 18 U.S.C. § 924(c)(1). Additionally, a sentence imposed under section 924(c)(1) may not "run concurrently with any other term of imprisonment." *Id.*

By contrast, and for example, section 924(b) forbids, *inter alia*, "ship[ping], transport[ing], or receiv[ing] a firearm or any

ammunition in interstate or foreign commerce" with the intent to commit another offense punishable by more than one year of prison. Section 924(b), which criminalizes "ship[ping]" and "transport[ing]," but not "carrying" a firearm, contains no mandatory minimum sentence (it does impose a *maximum* sentence of ten years imprisonment, however), and may run concurrently with other sentences. 18 U.S.C. § 924(b). Indeed, a violation of section 924(b) could conceivably be punished by a "fin[e] under this title" alone. *Id.* By prescribing a more onerous sentencing scheme for "carr[ying]" a firearm than for "ship[ping]" or "transport[ing]" one, Congress has obviously viewed "carrying" a firearm to be a far more egregious, and therefore limited offense. *Cf. United States v. McFadden*, 13 F.3d at 467 (Breyer, C.J., dissenting). That conclusion comports with common sense: "A drug dealer who packs heat is more likely to hurt someone or provoke someone else to violence" than a drug dealer who merely possesses or transports a weapon without bearing it on his person. *See United States v. Foster*, 1998 WL 2521, at *4.

The different, and far more serious nature of "carrying" a firearm is also borne out by the sentence enhancement imposed by the United States Sentencing Guidelines for merely "possess[ing] a firearm." *See Bailey v. United States*, 516 U.S. at 150. For example, under U.S.S.G. § 2D1.1(b)(1) (1997), "[i]f a dangerous weapon (including a firearm) was possessed" by the defendant in connection with the crime, the court is to assign a two-level enhancement to the offense level.[6] This enhancement, according to the Sentencing Commission, "reflects the increased danger of violence when drug traffickers possess weapons." U.S.S.G. § 2D1.1 application note 3. Even so, the sentence enhancement for merely "possess[ing]" a weapon is far less severe than the five-year (or greater) mandatory minimum imposed by statute for "carrying" a firearm in violation of section 924(c)(1).

On the facts of this case, for example, because petitioner's drug convictions involved 3.6 kilograms of marijuana, his base offense

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[6] Section 2D1.1(b)(1) does not apply if the defendant is convicted under section 924(c). *See* U.S.S.G. § 2K2.4 application note 2 (1997).

level was 12. *See* U.S.S.G. § 2D1.1(a)(3) (1995). After adjusting for petitioner's acceptance of responsibility, *see* U.S.S.G. § 3E1.1(a) (1995), his final offense level was 10 — placing him in the 6-to-12 month sentencing range. *See* U.S.S.G. ch. 5, pt. A (1995). The two-level enhancement for possessing a firearm would have increased the final offense level to 12 (a sentencing range of 10 to 16 months). In this case, then, petitioner's mere "possession" of a firearm would have resulted in only four months' additional prison time — a far cry from the five-year statutory minimum for a defendant who "carries a firearm" in contravention of section 924(c)(1). *See United States v. McFadden*, 13 F.3d at 467 (Breyer, C.J., dissenting).

Finally, petitioner's proposed construction does not suffer from any of the "impossible line-drawing problem[s]" that the government's and the Fifth Circuit's constructions would engender. *See Bailey v. United States*, 516 U.S. at 149. Under petitioner's proposed construction, the term "carries a firearm" would simply mean that the firearm was borne on the defendant's person. This would be an easily explained, easily applied standard for the lower courts: Juries so charged would understand precisely the sort of evidence required to find that the defendant had "carried a firearm." Likewise, both district courts and courts of appeals would have an easily applied standard for ruling on challenges to the sufficiency of the evidence.

2. Even though the legislative history of section 924(c) is "sparse," *Simpson v. United States*, 435 U.S. 6, 15 (1978), what there is points in the direction of a congressional view that "carries" means "bears on the person."

Section 924(c) was originally enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224, and provided in pertinent part:

> Whoever — (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

This provision originated in the House as a floor amendment to the Gun Control Act proposed by Representative Poff. 114 Cong. Rec. 22,231 (1968). *See Simpson v. United States*, 435 U.S. at 13-14 (discussing origins of section 924(c)). The Poff amendment, which ultimately provided the language for section 924(c), was adopted by the House instead of an alternative, similar amendment (also containing the "use or carries" language) proposed by Representative Casey. *See* 114 Cong. Rec. at 21,765-66, 21,770, 22,229.

The legislative history suggests that "carries a firearm" was understood by the representatives to mean "bears on one's person." Several representatives raised concerns that policemen (or other persons legally authorized to carry guns) would be subject to punishment even if the crime had nothing to do with the gun: "Suppose a policeman carrying a gun, as policemen do, were to slap somebody and it were found that he was not justified in doing so." 114 Cong. Rec. at 21,788 (statement of Rep. Yates). *See also id.* at 21,788-89 ("If I am convicted of assault — if I push somebody in the street or punch somebody in the nose — with no use of the pistol, but merely carrying the pistol as I am licensed to do . . . .") (statement of Rep. Scheuer). In these statements, the representatives were clearly using the word "carrying" to mean "bearing on the person," for the only way that a person "in the street" could carry a firearm, while at the same time slapping, punching, or otherwise physically assaulting a person, would be by bearing the firearm on his person.

Other representatives also made statements evidencing an understanding that "carries" means "bears on one's person." In objecting to the proposed requirement that the firearm be carried "unlawfully," Representative (now Judge) Meskill stated: "I think the provisions of the Poff substitute should apply to every person whether he carries a gun lawfully or unlawfully, if he commits a Federal felony while *he has a firearm on his person*." 114 Cong. Rec. 22,236 (emphasis added). Representative Pucinski, speaking in support of the Casey bill, likewise recognized that the proposed bill would, "for the first time, make a criminal who *takes a gun in his hand* realize that he is going to be prosecuted to the fullest extent of the Federal law." *Id.* at 22,239 (emphasis added). These exchanges

suggest that individual members of Congress contemplated that "carries" was synonymous with "bears on one's person."

The amendment history of section 924(c) also suggests this construction. *See Bailey v. United States*, 516 U.S. at 147. Congress substantially amended section 924(c) as part of the Comprehensive Crime Control Act of 1984. *See* Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138-2139. Among other changes, the law removed the "unlawfully" requirement from "carries," and merged the "uses" and "carries" prongs into a single subsection. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 312 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3491-92. The Senate Report suggested that "[e]vidence that the defendant had a gun in his pocket but did not display it, or refer to it," would support a conviction for "carrying" a firearm. 1984 U.S.C.C.A.N. at 3492 n.10.[7] This passage is instructive, for it shows that "each enumerated example of conduct that would violate the 'carry' prong [of section 924(c)(1)] involves a situation where the perpetrator was 'carrying' the weapon on his or her person, and thus, had the firearm available for immediate use." Note, 30 Creighton L. Rev. at 562.

3. Finally, even if this Court were to conclude that the text, context, and history of section 924(c)(1) do not compel petitioner's proposed interpretation of "carries a firearm," there can be no serious doubt that petitioner's interpretation is *at least* a reasonable one, and that the statute is therefore *at least* ambiguous. Under the rule of

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[7] The pertinent part of the Senate Report reads as follows:

> Evidence that the defendant *had a gun in his pocke:* but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape. . . . Moreover, the requirement that the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence played no part in the crime, *such as a gun carried in a pocket* and never displayed or referred to in the course of a pugilistic barroom fight.

1984 U.S.C.C.A.N. at 3492 n.10 (emphasis added).

lenity, which is an "established rule of construction," "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Simpson v. United States*, 435 U.S. at 14, quoting *United States v. Bass*, 404 U.S. 336, 347 (1971). *See also United States v. Lanier*, 117 S. Ct. 1219, 1225 (1997); *United States v. Granderson*, 511 U.S. 39, 54 (1994); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Bell v. United States*, 349 U.S. 81, 83 (1955). That rule is dispositive here.

The rule of lenity is a "wise principl[e]" of strict construction of criminal statutes, founded on the well-settled rationale that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *United States v. Bass*, 404 U.S. at 348, quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). As demonstrated above, "the common world" — or at least reasonable members thereof — would understand a prohibition upon "carry[ing] a firearm" to cover those persons who bear firearms upon their person, but no others. Thus, neither the Fifth Circuit's, nor the government's, interpretation of section 924(c)(1) can be said to be "unambiguously correct," *United States v. Granderson*, 511 U.S. at 54, which compels adoption of petitioner's proposed interpretation.

4. If the Court agrees with petitioner that the proper construction of "carries a firearm" is "bears on the person," the proper course would be for this Court to reverse the judgment of conviction. There is no dispute that the firearm was "'[l]ocated inside the glove compartment of [petitioner's] Ford truck'" (Pet. App. 2a, 9a, 12a-13a; J.A. 12), where it had been "for a long period of time." Pet. App. 10a.

II. AT THE VERY LEAST, A FIREARM MUST BE IMMEDIATELY ACCESSIBLE TO THE DEFENDANT TO BE "CARRIE[D]" FOR PURPOSES OF SECTION 924(c)(1)

If this Court should decline to adopt the construction of "carries a firearm" petitioner has proposed in section I, above, it should still reject the Fifth Circuit's and the government's broad constructions of

"carries a firearm" and hold that a firearm must be, if not actually on the defendant, immediately accessible within a vehicle for use as a weapon to be "carried."

1. Defining the term "carries a firearm" to mean "possesses in a vehicle in a manner immediately accessible to the defendant" is supported by decisions of the courts of appeals for the Second, Sixth, and Ninth Circuits. *See, e.g., United States v. Cruz-Rojas*, 101 F.3d 283, 286 (2d Cir. 1996); *United States v. Malcuit*, 104 F.3d 880, 885 (6th Cir.), *reh'g en banc granted*, 116 F.3d 163 (6th Cir. 1997); *United States v. Foster*, 1998 WL 2521, at *5. Although this construction would be less faithful to the statutory language and context than the "bears on one's person" construction that petitioner principally advocates above, it is far more supportable than the unreasonably broad views taken by the Fifth Circuit and by the government.

The most extensive explication of the "immediate access" construction of section 924(c)(1) came in the Ninth Circuit's recent *en banc* decision in *United States v. Foster*. There, the Ninth Circuit recognized the correctness of the principal construction advocated by petitioner — the "bears on the person" construction of "carries a firearm." See 1998 WL 2521 at * 1 ("If I were to say 'Don Corleone is carrying a gun' . . . you would understand that the Don has a sidearm *somewhere on his person*.") (emphasis added). However, the court went on to say that "[t]he key aspect of th[is] definition is not that the weapon actually be borne on the person. Rather, it is that the weapon remain within easy reach while the individual is in motion. . . . The essence is that the weapon moves with the person and can be swiftly put to use." *Id.* at * 2.

Like the Ninth Circuit, the Second and Sixth Circuits have also adopted this intermediate construction of "carries a firearm." *See, e.g., United States v. Cruz-Rojas*, 101 F.3d at 286; *United States v. Giraldo*, 80 F.3d 667, 677-78 (2d Cir.), *cert. denied*, 117 S. Ct. 135 (1996); *United States v. Malcuit*, 104 F.3d at 885, *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir. 1996); *see also* Pet. App. 14a-15a (collecting cases). And this position is also consistent with the stated views of Justices Scalia, Stevens, and Souter, that "carrying

a firearm" means "carrying it in such manner as to be ready for use as a weapon." *Smith v. United States*, 508 U.S. at 245-46 (Scalia, J., dissenting).

At an absolute minimum, this intermediate construction of "carries a firearm" must be adopted. No broader reading of the statute would be consistent with *Bailey*, with ordinary tools of statutory construction, or with the legislative history of section 924(c)(1).

2. Construing "carries a firearm" to mean "possesses the firearm in an area of a vehicle immediately accessible to the defendant" would also be consistent with the rule of lenity, as discussed above. This intermediate construction is also a "reasonable" one, evidenced by the fact that virtually every active judge of the Second Circuit,[8] the judges of the Sixth Circuit (pending the *en banc* decision in *United States v. Malcuit*), and an 8-3 *en banc* majority of the Ninth Circuit has now subscribed to it.

3. In the event that this Court adopts the "immediate access" construction of "carries a firearm," the proper course would be for this Court to reverse the judgment of conviction. The government has never disputed that the pistol possessed by petitioner was contained in a *locked* glove compartment, as stated in the pre-sentence report prepared by the United States Probation Office and cited by the district court and the Fifth Circuit (*see* Pet. App. 3a, 13a). There can be no doubt that a firearm possessed in a locked glove compartment would not be immediately accessible. Thus, even under this alternative proposed construction of "carries a firearm," petitioner's conviction should be reversed.

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[8] Six of the nine active judges (and four senior judges) of the Second Circuit have agreed with this construction; none has disagreed with it. *See* Reply Brief for the Petitioner (July 7, 1997), at 4 n.4 (citing cases); *see also United States v. Riascos-Suarez*, 73 F.3d at 623 (per Oakes, J.).

III. NEITHER THE CONSTRUCTION ADOPTED BY THE FIFTH CIRCUIT, NOR THE ONE ADVOCATED BY THE GOVERNMENT, CAN BE SQUARED WITH THE TEXT, CONTEXT, OR HISTORY OF THE STATUTE

The Fifth Circuit held that "[w]hen . . . the defendant knowingly possesses a firearm in a motor vehicle and uses the vehicle during the commission of the underlying crime, then *as a matter of law* the firearm is carried during a drug-trafficking offense for purposes of § 924(c)." Pet. App. 6a (emphasis added). The government, in opposing certiorari, offered a slightly different formulation: "[T]o carry an object means to transport it." Opp. 6. Neither of these constructions can be squared with the text or context of section 924(c)(1).

1. As discussed at pp. 8-22, above, the ordinary and natural understanding of "carries a firearm," which is supported by the text and context of section 924(c)(1), means "bears on the person," or, at the very least, "bears in a vehicle in a manner immediately accessible to the defendant." Even though one of the many dictionary definitions of the word "carry" is "to move while supporting (as in a vehicle or in one's hands or arms)" (*Webster's Third New International Dictionary* at 343; *see* Opp. 6), this is not the ordinary or natural meaning of "carry" as used in the statutory phrase at issue, "carries a firearm."

2. "Carry," in the context of section 924(c)(1), cannot mean either "knowingly possess" in a vehicle, as the Fifth Circuit held, or "transport," as the government urges. Either construction would violate the well-established principle that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. at 23 (quotation omitted). As noted at pp. 13-14, above, Congress knows how to criminalize both "possession" and "transportation" of a firearm, and it has done so in a wide variety of contexts. And Congress would be free to amend section 924(c)(1) in the future in order to criminalize "possession"

and/or "transportation." But it did not do so in current section 924(c)(1).

3. Additionally, the approaches of the government and of the Fifth Circuit "would distort the language of the statute," *Bailey v. United States*, 516 U.S. at 149, by creating an unsupportable, unwieldy and ultimately unworkable distinction between "vehicle cases" and non-vehicle cases. Indeed, the Fifth Circuit has freely admitted that it has carved out a specialized meaning for "carry" in "vehicle cases": "When a vehicle is used, 'carrying' takes on a *different meaning* from carrying on the person because the means of carrying is the vehicle itself." *United States v. Pineda-Ortuna*, 952 F.2d 98, 104 (5th Cir.), *cert. denied*, 504 U.S. 928 (1992) (emphasis added). The First, Fourth, Eighth and Tenth Circuits also subscribe to the notion that the word "carries" takes on a different meaning when the defendant is in a vehicle. *See, e.g., United States v. Nelson*, 109 F.3d 1323, 1326 (8th Cir. 1997) (holding that "when a motor vehicle is used, 'carrying a weapon' takes on a less restrictive meaning than carrying on the person") (citation and quotation omitted); *United States v. Cleveland*, 106 F.3d 1056, 1066 (1st Cir.), *cert. granted*, 118 S. Ct. 621 (1997); *United States v. Mitchell*, 104 F.3d 649, 653-54 (4th Cir. 1997); *United States v. Cardenas*, 864 F.2d at 1535-36.

This approach is manifestly erroneous. Nothing in the text or context of the statute, or in its legislative history, suggests that the term "carries" should bear a "different meaning" simply because of the surroundings of the defendant at the time of his arrest. Of course, the text of section 924(c)(1) uses the term "carries a firearm" once and only once. While in the most extraordinary cases, it may be appropriate to conclude that the same term used *twice* in the same statute bears a different meaning each time, *see Dewsnup v. Timm*, 502 U.S. 410, 417-20 (1992), no coherent principle of statutory construction would allow the same term used *once* in the same statute to bear contrary meanings in different cases. Indeed, "[i]t would be an extraordinary principle of construction that would authorize or permit a court to give the same statute wholly different meanings in different cases." *United States v. Louisiana*, 394 U.S. 11, 34 (1969).

"[I]mpossible line-drawing problem[s]" (*Bailey v. United States*, 516 U.S. at 149) would also be presented by the government's and Fifth Circuit's constructions. "[T]hose same line-drawing problems [presented by the government's rejected construction of 'use' in *Bailey*] would accompany any effort to expand the 'carry prong' to situations where the firearm was not immediately accessible. For example, a situation could arise where the weapon was in the back of a van, a camper, inside a car being towed, or possibly even in the trunk of a friend's car who is following the defendant to a drug deal." Note, 30 Creighton L. Rev. at 563 (footnote omitted). And absent such line-drawing, absurd results would follow: Under the government's construction of the statute, a gun placed in the caboose of a train would be transported and thus "carried" by the engineer, even where the engineer was 50, 100, or more railroad cars removed from the gun. It is difficult to believe that Congress would have intended to punish that engineer as severely as one who "uses" or "actively employs" a firearm, *e.g.*, by threatening or shooting at someone with it.

4. If, even in light of these showings, this Court concludes that either the Fifth Circuit's or the government's construction is a reasonable construction of section 924(c)(1), the Court should still adopt one of petitioner's proposed constructions under the rule of lenity. That rule, of course, applies "where text, structure, and history" of a criminal statute "fail to establish that the Government's position is unambiguously correct." *United States v. Granderson*, 511 U.S. at 54 (emphasis added). Even if the constructions adopted by the Fifth Circuit, or advocated by the government, could be said to be "reasonable" — and petitioner does not believe that either one can — they cannot possibly be said to be "unambiguously correct."

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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